

THE FEDERAL COMMUNICATIONS COMMISSION

**Suggestions to the Federal Communications Commission for the Interpretation of
the Communication Assistance for Law Enforcement Act of 1994**
47 CFR Parts 22, 24 and 64, ET Docket No. 04-295

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Comment Submitted To: Commission's Secretary
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Date: November 29, 2004

I respectfully submit the following comment concerning the interpretation of certain specified terms within the Communications Assistance for Law Enforcement Act of 1994 ("CALEA"). I am commenting in response to the Notice of Proposed Rule Making ("NPRM") that appeared in the *Federal Register* on September 23, 2004. While I am aware that the comment period closed on November 8, 2004, I respectfully request that the Federal Communications Commission ("FCC" or "Commission") still consider this comment when finalizing its rule. Finally, I would like to thank the FCC for the opportunity to comment on this notice of proposed rule making.

SCOPE:

This comment addresses three questions posed by the Commission in its NPRM: (1) whether the distinction between managed and non-managed voice over Internet Protocol ("VoIP") is appropriate;¹ (2) whether managed VoIP providers should be subjected to the requirements of CALEA;² and (3) whether non-managed VoIP providers should be subjected to the requirements of CALEA.³

¹ NPRM at ¶ 7.

² NPRM at ¶ 19.

³ NPRM at ¶ 20.

CONCLUSION:

The Commission's distinction between managed and non-managed VoIP providers is appropriate because the distinction correctly aligns the differences between the two providers in accordance with CALEA. Additionally, as tentatively decided by the Commission, the Commission should apply the requirements of CALEA to managed VoIP providers because managed VoIP providers are telecommunications carriers and because not subjecting broadband access providers to CALEA could undermine law enforcement's surveillance efforts. Finally, the Commission should not apply the requirements of CALEA to non-managed VoIP providers because non-managed VoIP providers do not fit within the definition of a telecommunications carrier and public interest is best served by not applying CALEA.

DISCUSSION:

I. INTRODUCTION.

A. My Personal Background.

Currently, I am a third-year law student at Villanova University School of Law. This past summer, I was both an intern at a district attorney's office and an academic researcher on First Amendment jurisprudence. Because of both my practical and academic experience, I chose to comment on CALEA. My comment reflects my personal interests only.

The district attorney's office that I worked for was the Chester County District Attorney's Office in the State of Pennsylvania. During my employment, I worked with many law enforcement officers and attorneys. From my experience, I learned that successful prosecutions require effective investigative work. In turn, effective investigative work requires access to accurate information. Therefore, because of my experiences, I am aware of the acute need of law enforcement to have the ability to access information.

Nevertheless, my personal experience has also taught me that at times members of the law enforcement community can be overly zealous. In their zeal, law enforcement may request abilities that are impractical for the community at large. I have learned that, in those circumstances, it is important to temper law enforcement's requests with the needs of the community at large. Further, at times it may be important to place into effect rules and procedures. Such rules and procedures are necessary in order to ensure that persons affected by law enforcement's actions do not suffer undue burdens or are deterred from exercising their constitutional rights.

In addition to my internship at the District Attorney's office this summer, I worked for one of my professors as a research assistant. One of my responsibilities as a research assistant was to research First Amendment jurisprudence. Within First Amendment jurisprudence, I focused on the chilling effect on speech doctrine. The primary concern behind the chilling effect on speech doctrine is the concern regarding governmental deterrence of individual's First Amendment Right to free expression.

Because of my personal experiences both as a member of the law enforcement community and as an academic researcher, I believe that I am uniquely qualified to examine the implications of CALEA.

B. Background of CALEA.

In 1994, Congress enacted the Communications Assistance for Law Enforcement Act. While CALEA does not authorize electronic surveillance, it is designed to ensure that law enforcement has the ability to conduct electronic surveillance efficiently and effectively. Congress addressed these two concerns because it wanted to ensure that, with the fast changing telecommunications technologies, law enforcement would be able to conduct their investigations.

This particular NPRM is in response to a joint petition for rulemaking filed by the Department of Justice ("DoJ"), Federal Bureau of Investigation ("FBI") and Drug Enforcement Agency ("DEA"). The agencies were concerned with, *inter alia*, identifying the types of packet-mode services and entities that are subject to CALEA. In response to the law enforcement agencies' requests, this NPRM deals both with the CALEA compliance for any packet-mode application and voice communications.

Regarding the types of packet mode services and entities, law enforcement was concerned with whether new methods of communications were within the scope of CALEA. One of the packet-mode services at issue is VoIP. VoIP defines a way to carry voice calls over an IP network. VoIP encompasses digitizing and packetizing voice streams, which include normal speech. Thus, via VoIP technology, conversations can be conducted through internet service providers.

II. THE COMMISSION'S TENTATIVE CONCLUSION APPROPRIATELY DISTINGUISHES BETWEEN MANAGED AND NON-MANAGED VoIP PROVIDERS.

The Commission's tentative conclusion appropriately distinguishes between managed and non-managed VoIP providers because of CALEA's definition of a "telecommunications carrier." Thus, to comply with CALEA as the Commission tentatively has, the Commission must recognize a distinction between "managed" and "non-managed" VoIP providers.

According to CALEA, the term “telecommunications carrier” means an “entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire[.]”⁴ CALEA further illustrates which entities should be classified as telecommunications carrier by including an

“entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and it is in the public interest to deem such a person or entity to be a telecommunications carrier...”⁵

Thus, according to CALEA, a telecommunications carrier is defined as an entity either transmitting or switching wire or electronic communications as a common carrier. Further, included in that definition are entities that the Commission deems meet certain criteria.

The Commission has tentatively accepted law enforcement’s distinction between managed and non-managed VoIP providers.⁶ Thus, by tentatively accepting law enforcement’s suggestion, the Commission tentatively recognizes “managed” or “mediated” VoIP providers as those who provide services that offer voice communications calling capability. Within this distinction, the managed VoIP provider acts as a mediator to manage the communication between its end points. Consequently, because a managed VoIP provider acts as a mediator between the communication’s end points, the VoIP provider enables call set up, connection, termination, and party identification features. Additionally, these managed VoIP providers frequently generate or modify dialing, signaling, switching, addressing or routing functions for the user. Under the Commission’s tentative conclusion, examples of managed VoIP providers would include Verizon, Comcast, Vonage and AT&T CallVantage.

The FCC distinguishes these “managed” VoIP from “non-managed” or “peer-to-peer” communications, which involve disintermediated communications that are set up and managed by the end user via its customer premises equipment or personal computer.⁷ In these non-managed, or disintermediated, communications, the VoIP provider has minimal or no involvement in the flow of packets during the communication, serving instead primarily as a directory that provides users’ Internet web addresses to facilitate peer-to-peer communications.⁸ Under the Commission’s tentative conclusion, examples of non-managed VoIP providers would include Skype or voice enabled instant messaging.

⁴ 47 U.S.C.S. § 1001(8)(A) (2004).

⁵ 47 U.S.C.S. § 1001(8)(B)(ii) (2004).

⁶ *NPRM* at ¶ 7.

⁷ *Id.*

⁸ *Id.*

I agree with the FCC's tentative conclusion that the distinction between managed and non-managed VoIP is an appropriate one. Further, I believe that the distinction is mandated by the language in CALEA. In order to be classified as a telecommunications carrier and thus subject to CALEA, an entity must either transmit or switch wire or electronic communications as a common carrier.⁹ The Commission's tentative conclusion explicitly recognizes the differences between an entity that actively engages in transmitting or switching wire or electronic communications and those that do not. The Commission's conclusion recognizes this distinction based on its definition that a managed VoIP is one who provides voice services and acts as a mediator to manage the communication between its end points.¹⁰ Thus, under the Commission's definition, a managed VoIP actively engages in the transmission and does so for hire.

Further, the Commission's definition of a non-managed VoIP accurately takes into account the difference between a provider of VoIP who neither transmits nor switches either wire or electronic communications and a provider who does so. Specifically, the Commission's definition takes these differences into account by stating that a non-managed VoIP communication is disintermediated, the end users manage the communication, and the VoIP provider has minimal or no involvement with the flow of information packets.¹¹ Thus, a non-managed VoIP provider should not be subject to CALEA, as discussed in detail below.

Therefore, because the Commission's tentative conclusion recognizes a distinction between managed and non-managed VoIP in accordance with the definition of a telecommunications carrier within CALEA, the Commission has appropriately distinguished between the two kinds of VoIP providers.

III. MANAGED VoIP SERVICE PROVIDERS SHOULD BE SUBJECT TO CALEA BECAUSE THEY ARE TELECOMMUNICATIONS CARRIERS, AND ONLY SUBJECTING BROADBAND ACCESS PROVIDERS TO CALEA COULD UNDERMINE LAW ENFORCEMENT'S SURVEILLANCE EFFORTS.

A. Managed VoIP Service Providers Are Telecommunications Carriers as Defined by CALEA.

Managed VoIP service providers should be subject to CALEA because they meet the definition of a telecommunications carrier.¹² Under CALEA, to be a telecommunications carrier an entity must either transmit or switch, wire or electronic communications as a common carrier.¹³ Again, a managed VoIP provider by definition

⁹ 47 U.S.C.S. § 1001(8)(A) (2004).

¹⁰ *NPRM* at ¶ 7.

¹¹ *Id.*

¹² 47 U.S.C.S. § 1001(8)(A) (2004).

¹³ *Id.*

engages in the transmission and switching of electronic or wired communication for hire.¹⁴ As such, managed VoIP providers fall within the definition of a telecommunications carrier as defined by CALEA and thus should be subject to CALEA.

B. Managed VoIP Service Providers Should Be Subject to CALEA Because They Fall into the Category of Communications Providers Expressly Included in CALEA.

Even if it were unclear whether managed VoIP providers met the definition of a telecommunications carrier, managed VoIP service providers should be subject to CALEA because they fall into the category of communications providers expressly included in CALEA.¹⁵ CALEA specifically recognizes entities that “engage[] in providing wire or electronic communication switching or transmission service ... that the Commission finds ... is a replacement for a substantial portion of the local telephone exchange service and it is in the public interest to deem ... [the] entity to be a telecommunications carrier...”¹⁶ Thus, if an entity meets the requirements of a telecommunications carrier, it should be subject to CALEA.

The service that these managed VoIP providers offer is clearly included within CALEA. Specifically, the Commission should conclude, as it tentatively has concluded, that managed VoIP is a replacement for a substantial portion of local telephone exchange service.¹⁷ Additionally, the FCC should conclude, as it tentatively has concluded, that it is in the public’s interest for the FCC to deem managed VoIP providers to be included in CALEA.¹⁸ In order for the FCC to determine whether it is in the public interest to deem managed VoIP providers as being subject to CALEA the FCC must exam and conclude that the application of CALEA, at a minimum: promotes competition; encourages development of new technologies; and protects public safety and national security.¹⁹

1. Managed VoIP providers replace a substantial portion of the local telephone exchange.

Managed VoIP providers replace a substantial portion of the local telephone exchange because these providers seek to compete and replace the local telephone exchange. Examples of managed VoIP providers include Verizon, Comcast, Vonage and AT&T CallVantage. Although not necessarily originally involved the telecommunications industry, these providers have traditionally been involved in the communications industry. These companies exemplify corporations that have entered the market in an attempt to exploit the cost saving advantages to traditional phone services.

¹⁴ *NPRM* at ¶ 7.

¹⁵ 47 U.S.C.S. § 1001(8)(B)(ii) (2004).

¹⁶ *Id.*

¹⁷ *NPRM* at ¶ 19.

¹⁸ *Id.*

¹⁹ *NPRM* at ¶ 15.

For example, one of the fastest growth areas for AT&T is VoIP because it is less expensive for the company to connect.²⁰ Currently, regulatory reasons, like the FCC's recent ruling not to subject a VoIP provider to state telecommunications regulation, and industry reasons, like Qwest's recent statement that it will not charge for VoIP connections to its customers, account for the lower expenses of VoIP providers. Because these corporations and other similar corporations compete with the local telephone exchange service and have been rapidly replacing traditional local telephone exchange service, these corporations pass the substantial replacement provision of CALEA.²¹

2. Managed VoIP providers should be deemed telecommunications carriers and subject to CALEA because the public interest is best served by applying CALEA to managed VoIP providers.

Managed VoIP providers should be labeled as telecommunications carriers subject to CALEA because, as required by CALEA,²² the public interest is best served by applying CALEA to managed VoIP providers. As the FCC has tentatively concluded, it is in the public interest to deem these telecommunications providers as telecommunications carriers and thus subject them to the requirements of CALEA. Again, in determining whether the public interest is best served by applying CALEA to managed VoIP providers the Commission must, at a minimum, consider the effect on competition, the effect on development of new technology, and the effect on public safety and national security.²³

a. Labeling managed VoIP providers as telecommunications carriers and applying the requirements of CALEA best serves the public interest of competition.

Labeling managed VoIP providers as telecommunications carriers and applying the requirements of CALEA best serves the public interest of competition because the imposition of CALEA will promote competition between managed VoIP providers and traditional local telephone exchanges. If the Commission does not subject managed VoIP providers to CALEA, the Commission would create a regulatory advantage for managed VoIP service providers.

Such an advantage is created because a service that is nearly identical and often connects to traditional local telephone exchanges, would not be subject to the regulatory burden of CALEA. Some of the regulatory burdens include the installation of equipment

²⁰ Ken Belson, *AT&T's Net and Revenue Fall*, N.Y. Times, April 23, 2004, at 4.

²¹ 47 U.S.C.S. § 1001(8)(B)(ii) (2004).

²² 47 U.S.C.S. § 1001(8)(B)(ii) (2004).

²³ *NPRM* at ¶ 15.

to provide law enforcement with CALEA specified capabilities capabilities²⁴ and maintaining systems security and integrity so that only lawful access can occur.²⁵

If managed VoIP providers were not subject to these burdens, managed VoIP would be able to provide telecommunications at a lower price than its competition - other more traditional telecommunication carriers. The result is that the two telecommunications sectors would not be on an equal regulatory ground and thus traditional telecommunications carriers would not be as competitive with managed VoIP providers. Therefore, the public interest of fostering competition is best served by enabling regulatory parity between managed VoIP and traditional telecommunications providers.

- b. Managed VoIP providers should be labeled as telecommunications carriers and subject to the requirements of CALEA because the public interest of the development of new technology is best served by doing so.

As the FCC has tentatively concluded, the public interest in development of new technology is best served by labeling managed VoIP providers as telecommunication carriers and imposing the requirements of CALEA. Again, regulatory parity will provide an equal ground upon which managed VoIP and traditional telecommunications providers, like local telephone exchanges, can compete. By establishing an equal playing field, the FCC will create and maintain an environment that will foster development of both managed VoIP technology and traditional telecommunications technology.

Regulatory parity promotes technological development of the sectors equally because each sector is subject to the same governmental constraints. Thus, improvement in one sector will correspondingly incentivize the other sector to improve. Specifically, improvement in the first sector will promote a corresponding improvement in the other sector because, if the second sector does not create a similar technological improvement, that sector will fall behind and be rendered obsolete.

For example, if only the traditional communications providers were subject to CALEA and that sector were to improve its technology, managed VoIP may not have an incentive to improve its technology because the traditional telecommunications carrier's improvement may have only offset the regulatory burden, which CALEA imposed on it. Another example is if the traditional telecommunications provider were subject to CALEA and the managed VoIP sector experienced a technological improvement, the traditional telecommunications sector may not have an incentive to improve because there is not feasible technological development that would make the sector profitable.

²⁴ 47 U.S.C.S. § 1002 (2004).

²⁵ 47 U.S.C.S. § 1004 (2004).

- c. Managed VoIP providers should be labeled as telecommunications carriers and subject to the requirements of CALEA because the public safety and national security interest is best served by doing so.

As the FCC has tentatively concluded,²⁶ the public interest in protecting public safety and national security is best served by imposing CALEA's requirements upon managed VoIP. As the acronym of CALEA implies, the purpose of CALEA is to provide communications assistance for law enforcement. The reason that the requirements of CALEA are imposed on traditional telecommunications carriers is that those carriers are in an ideal situation to assist law enforcement with legal wire taps and other forms of electronic surveillance.

Not subjecting managed VoIP providers to the same requirements of CALEA would defeat the public safety and national security efforts that CALEA embodies. The public safety and national security efforts of CALEA would be defeated because the characteristics of managed VoIP provided services and traditional telephone provided services are nearly indistinguishable.

As such, managed VoIP providers are entering the telecommunications market and competing with traditional telecommunications providers like standard telephone exchange service or providers. When competing with traditional phone service providers, the managed VoIP providers seek to replace the traditional telephone service providers. If and when a managed VoIP provider replaces the traditional telephone service provider in a residence or business, the managed VoIP establishes a traditional telephone number that user can be reached by another VoIP or traditional telephone service. As such, the managed VoIP is indistinguishable from the perspective of an outside caller, and, indeed, the new managed VoIP subscriber has chosen to use VoIP because of its compatibility and similarity to traditional telephone providers. Thus, because of the nearly indistinguishable difference between traditional telephone providers and managed VoIP providers, public safety and national security requires applying CALEA evenly to both.

B. Managed VoIP Providers Should Be Subject to the Requirements of CALEA Because Only Subjecting Broadband Service Providers to CALEA Could Undermine the Surveillance Efforts of Law Enforcement.

Only subjecting broadband service providers to CALEA could undermine the surveillance efforts of law enforcement, and therefore managed VoIP Providers should be subject to the requirements of CALEA. Law enforcement's surveillance efforts could be undermined because only requiring broadband access to law enforcement does not guarantee law enforcement access to the electronic communication, and this frustrates the purpose of CALEA. The purpose of CALEA is to assist or help facilitate law

²⁶ *NPRM* at ¶ 19.

enforcement's legal wire tap activities. Such assistance is meaningless if law enforcement does not actually have access to the information, which it is attempting to access. Specifically, as mentioned in the NPRM, basic capabilities essential to Law Enforcement's surveillance efforts, such as access to call management information may not be reasonably available to the broadband access provider.

Such information may not be reasonably available to the broadband access provider because the broadband access provider does not serve as a facilitator or mediator of the communication. Rather, the broadband access provider merely provides the means or ability for the individual to access the internet. As such, the broadband access provider does not actively engage in facilitating the communication. Because the broadband access provider does not actively engage in the communication, that entity neither directly possesses nor may be able to access the information that law enforcement is authorized to obtain. The broadband access provider may not be able to access the information if the managed VoIP provider has encrypted the communication.

Another example is if law enforcement were interested in obtaining call routing information, the broadband access providers would be unable to provide that information to law enforcement because of the managed VoIP provider. In order for law enforcement to gain access to such information, it would have to decrypt or decode the transmission as encrypted by the managed VoIP provider. Such efforts by the law enforcement community are unnecessary because managed VoIP providers readily have the ability to decrypt their own encryptions, though managed VoIP would not have to decrypt its user's or subscriber's encryptions.²⁷ Thus, only subjecting broadband access providers to CALEA could undermine law enforcement's surveillance efforts because law enforcement may not be able to decode managed VoIP provider's encryptions.

IV. NON-MANAGED VoIP PROVIDERS SHOULD BE EXCLUDED FROM THE REQUIREMENTS OF CALEA BECAUSE NON-MANAGED VoIP PROVIDERS ARE NEITHER TELECOMMUNICATIONS CARRIERS, AS DEFINED BY CALEA, NOR ONE OF THE SERVICES INCLUDED AS TELECOMMUNICATIONS CARRIERS UNDER CALEA.

As the Commission has tentatively concluded, non-managed VoIP providers should be excluded from the requirements of CALEA. I agree with the Commission when it states that non-managed VoIP services do not appear to be subject to CALEA because (1) they are akin to private networks, which Congress expressly excluded under section 103's requirements, and (2) "they do not appear to fall within the Substantial Replacement Provision[.]"²⁸ However, I believe that CALEA does not apply to non-managed VoIP providers or services because by definition non-managed VoIP providers are not telecommunications carriers as defined by CALEA.²⁹ Further, such non-managed

²⁷ 47 U.S.C.S. § 1002(b)(3) (2004).

²⁸ NPRM at ¶ 20.

²⁹ 47 U.S.C.S. § 1001(8)(A) (2004).

VoIP providers do not fall within the definition of providers to be included under CALEA.³⁰

A. Non-Managed VoIP Providers Should Not be Subject to the Requirements of CALEA Because Non-Managed VoIP Providers are Outside the Definition of Telecommunications Carriers as Defined by CALEA.

The Commission should not deem the non-managed VoIP providers to be telecommunications carriers because such providers do not meet CALEA's definition of a telecommunications carrier. As stated in the definition section of CALEA, a "telecommunications carrier" means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.³¹ As tentatively defined by the Commission, non-managed communications are "setup and managed by the end user via its customer premises equipment or personal computer."³² Furthermore, "[i]n these non-managed, or disintermediate, communications, the VoIP provider has minimal or no involvement in the flow packets during the communication, serving instead primarily as a directory that provides users' Internet web addresses to facilitate peer-to-peer communications."³³ Thus, by definition, the non-managed VoIP providers have a de minimis involvement in facilitating or providing communication and therefore fall outside the scope of telecommunications carriers defined by and subject to CALEA.

B. Non-Managed VoIP Providers Should Not Be Subject to the Requirements of CALEA Because CALEA Does Not Include Non-Managed VoIP Providers.

Non-managed VoIP providers should not be subject to the requirements of CALEA because non-managed VoIP providers are not within the telecommunication providers included by CALEA. As stated in the definition section of CALEA, a "telecommunications carrier" includes

"a person or entity in providing wire or electronic communication switching or transmission service that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunication carrier for purposes of this title."³⁴

³⁰ 47 U.S.C.S. § 1001(8)(B) (2004).

³¹ 47 U.S.C.S. § 1001(8)(A) (2004).

³² *NPRM* at ¶ 7.

³³ *Id.*

³⁴ 47 U.S.C.S. 1001(8)(B)(ii) (2004).

Thus, in order for a person or entity to be deemed a telecommunications carrier that person or entity must provide electronic communication switching or transmission service. Further, the Commission must find that such a service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem the person or entity to be a telecommunications carrier. Finally, when examining whether to apply CALEA to a person or entity, the Commission must look at the public interest served by applying CALEA to that person or entity. Under the criteria specified in NPRM,³⁵ at a minimum, the Commission must take into account the following when considering public interest: whether the application would promote competition, whether application would encouragement of new technologies, and how application of CALEA would affect public safety and national security.

1. Non-managed VoIP providers should not be subject to CALEA because by definition they do not engage in switching or transmitting electronic or wire communications.

Non-managed VoIP providers do not engage in switching or transmitting electronic or wire communications and therefore should not be subject to CALEA. Non-managed VoIP communications are “setup and managed by the end user via its customer premises equipment or personal computer.”³⁶ Furthermore, the non-managed VoIP provider does not engage in the transmission or switching because by definition the non-managed VoIP provider has “minimal or no involvement in the flow of packets during the communication.”³⁷ Therefore, because a non-managed VoIP provider does not meet the switching or transmission requirement as specified in CALEA,³⁸ the Commission cannot find that a non-managed VoIP provider is a telecommunications carrier and thus cannot subject it to CALEA.

2. Non-managed VoIP providers should not be subject to CALEA because by definition they do not replace a substantial portion of the local telephone exchange as required by CALEA.

By definition, non-managed VoIP providers do not replace a substantial portion of the local telephone exchange, and, therefore, they should not be subject to CALEA.³⁹ As stated in NPRM,⁴⁰ non-managed VoIP services or providers include voice enabled Instant Messaging and peer-to-peer based communications, like Skype. Because by definition these services and providers connect on a peer-to-peer basis, they do not replace a substantial portion of the local telephone exchange. In order to replace a substantial portion of the local telephone exchange, the services or providers would have to act like a

³⁵ NPRM at ¶ 15.

³⁶ NPRM at ¶ 7.

³⁷ *Id.*

³⁸ 47 U.S.C.S. § 1001(8)(B)(ii) (2004).

³⁹ *Id.*

⁴⁰ NPRM at ¶ 20.

local telephone exchange and mediate the communications between end users rather than merely acting as a passive forum for communication. Thus, because non-managed VoIP providers do not replace a substantial portion of the local telephone exchange, they should not be deemed subject to CALEA.

3. Non-managed VoIP providers should not be subject to CALEA because public interest is best served by not applying CALEA to such providers.

Public interest is best served by not applying CALEA to non-managed VoIP providers. The requirements of evaluating public interest mandate that even if the Commission were to find that non-managed VoIP providers act as a means of switching or transmitting and that such non-managed VoIP services or providers replace a substantial proportion of the local telephone exchange, the Commission would have to consider, at a minimum, the three public interest factors. As previously mentioned, those factors are the effect on competition, the development and provision of new technologies, and public safety and national security.

- a. The public interest of promoting competition is best served by the Commission not applying CALEA to non-managed VoIP providers.

Application of CALEA to non-managed VoIP providers and services will discourage competition and thus thwart the public interest of competition. In order to comply with CALEA once CALEA is imposed on the entity, the entity will have to “ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to ... communicat[e] are capable of” providing the government with access to the communication.⁴¹ For instance, if the equipment of the provider is deployed after January 1, 1995, the carrier bears the burden of covering reasonable costs associated with implementing CALEA.⁴² Additionally, telecommunications carriers subject to CALEA are responsible for ensuring system security and integrity.⁴³ Namely, the telecommunications carrier subject to CALEA must ensure that access to information affected within its switching premises can be activated only in accordance with lawful authorization.⁴⁴

Because the development of VoIP communications occurred primarily after January 1, 1995, if the Commission were to impose CALEA upon non-managed VoIP providers, those providers would bear the financial cost of implementing CALEA. Further, if non-managed VoIP providers were to be subject to CALEA, they would bear the burden of maintaining system security and integrity.

⁴¹ 47 U.S.C.S. § 1002 (2004).

⁴² 47 U.S.C.S. § 1008(b) (2004).

⁴³ 47 U.S.C.S. § 1004 (2004).

⁴⁴ *Id.*

These costs would have a negative effect on competition for a couple of reasons. First, competition would be negatively affected because rather than competing with other non-managed VoIP providers by lowering prices or providing better services, the non-managed VoIP providers would have to expend resources on deploying CALEA capable equipment. Second, competition would be negatively affected because rather than concentrating on competition with other non-managed VoIP providers or similar services by lowering prices or providing better services, the non-managed VoIP providers would have to expend resources on ensuring system security and integrity. These burdens on non-managed VoIP providers would undermine the public interest of competition in this sector.

- b. The public interest in the development of new technologies is best served by not applying CALEA to non-managed VoIP providers.

The public interest in the development of new technologies is best served by not applying CALEA to non-managed VoIP providers because the imposition of CALEA causes a drain of resources from the non-managed VoIP provider. Specifically, the non-managed VoIP provider is required to implement CALEA compatible facilities⁴⁵ (i.e. facilities that would enable law enforcement access to communication upon a proper showing of legal requirements). Ensuring that CALEA compliant facilities exist diverts valuable resources from the non-managed VoIP provider that would otherwise be spent on the development of new technologies. Thus, if non-managed VoIP providers were subject to the requirements of CALEA, the public interest in promoting the development of new technologies would be undermined because the non-managed VoIP providers would be spending time, money and other resources on ensuring CALEA compliant facilities and thus have less resources to foster the development of new technologies.

Additionally, the imposition of CALEA on non-managed VoIP providers would undermine the public interest in the development of new technologies in this sector because such an imposition would divert resources from the development of new technologies and, instead, forces resources to be spent on ensuring system security and integrity. As stated above, CALEA mandates that telecommunications carriers, which are subject to CALEA, must ensure system security and integrity.⁴⁶ When ensuring system security and integrity, CALEA requires that such telecommunications providers must ensure that access to information affected within its switching premises can be activate only in accordance with lawful authorization.⁴⁷ Ensuring system security and integrity requires an expenditure of resources from non-managed VoIP providers. These expenditures take resources from the non-managed VoIP provider that would otherwise be spent on the development of new technologies. Thus, because the non-managed VoIP providers would have less resources to devote to the development of new technologies,

⁴⁵ 47 U.S.C.S. § 1002(a) (2004).

⁴⁶ 47 U.S.C.S. § 1004 (2004).

⁴⁷ *Id.*

the public interest in promoting the development of new technologies would be undermined by the imposition of CALEA on non-managed VoIP providers.

- c. The public interest of public safety and national security is best served by not applying CALEA to non-managed VoIP providers.

The public interest of public safety and national security is best served by not applying CALEA to non-managed VoIP providers because, when measured against the personal privacy sacrificed, the benefits to public safety and security are outweighed by the loss of privacy. Specifically, the difference between managed and non-managed VoIP as tentatively adopted by the FCC turns upon the amount of mediation by a party other than the end user. In the case of a non-managed VoIP provider, the application merely provides the forum for communication and neither switches nor transmits the communication. Consequently, the end users are the switchers or transmitters.

In order to apply CALEA to non-managed VoIP the FCC would either have to mandate some kind of software, like “spyware,” be incorporated into the non-managed VoIP software or require that the end users be responsible for enabling law enforcement to have access to their communication. Neither option is viable. Speaking as a member of the public, I know that the American public would not tolerate the imposition of governmental spyware in its programs. The American public will not support such an imposition of spyware because the public expects a certain level of privacy and believes this privacy to be guaranteed by the Constitution. Additionally, the statutory language of CALEA, meant to protect privacy, would create a problem for the application of CALEA to non-manage VoIP providers.

- i. Applying CALEA to non-managed VoIP providers may pose a First Amendment issue.

Applying CALEA to non-managed VoIP providers may pose a First Amendment issue because a person right to free expression may be chilled. In particular, if a person were aware of the imbedded spyware, the person may be deterred from exercising his First Amendment Right to free expression because he would be concerned that the governmental actors readily had access to his communications. Additionally, he may be concerned that regardless of the lawfulness of his conversation, governmental actors may subject him to retaliatory sanctions. Those sanctions may include either criminal sanctions or harassment. Thus, a person may decide that it is better not to speak than it is to speak, and therefore his Constitutional Right to free speech would be chilled. If the Supreme Court were to find that an individual’s First Amendment right to expression was chilled, the Court may find the either the statute or that portion causing the chilling to be unconstitutional and thus void.⁴⁸

⁴⁸ Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

- ii. Applying CALEA to non-managed VoIP providers may conflict with the statutory language of CALEA meant to ensure privacy.

Applying CALEA to non-managed VoIP providers may conflict with at least two provisions within statutory language of CALEA meant to ensure privacy. So even if the public were to accept the imposition of governmental spyware in software, the Commission would still have problems with the language of CALEA itself. First, as the Commission has correctly identified, non-managed VoIP providers appear to be excluded from the CALEA capability requirements⁴⁹ because non-managed VoIP providers seem to provide services that support the transmission or switching of communications for private networks. Non-managed VoIP providers provide services that support the transport or switching of communications for private networks because the communications are initiated and managed by the end users rather than a mediator.

Second, as CALEA requires to protect privacy,⁵⁰ a telecommunications carrier subject to CALEA has the burden of ensuring systems security and integrity. Because ensuring systems security and integrity requires that interception can be “activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier ...[.]”⁵¹ in the case of non-managed VoIP providers, it is unclear how or who could provide the specified protection. The non-managed VoIP provider cannot do so because it, by definition, is not involved in the communication. Further, the end users cannot do so because they are the ones that law enforcement is trying to apply a wiretap. Thus, systems security and integrity requirement frustrates the application of CALEA to non-managed VoIP. Therefore, the application of CALEA to non-managed VoIP providers is not in the best interest of the public because when measured against the personal privacy invaded the possible benefit to public safety and national security is outweighed.

V. CONCLUSION.

In conclusion, the Commission’s distinction between managed and non-managed VoIP is appropriate. Additionally, the Commission should apply the requirements of CALEA to managed VoIP providers. Finally, the Commission should not apply the requirements of CALEA to non-managed VoIP providers.

Respectfully submitted,

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⁴⁹ 47 U.S.C.S. § 1002(b)(2)(a) (2004).

⁵⁰ 47 U.S.C.S. § 1004 (2004).

⁵¹ *Id.*